No. 1323

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK of Council Bluffs, Iowa, *Plaintiff in Error,*

vs.

J. A. MOORE, *Defendant in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

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ARGUMENT ON MOTION TO STRIKE BILL OF EXCEPTION AND TO DISREGARD ASSIGNMENT.

The first point of counsel for defendant in error is not altogether clear. Apparently they object to the bill of exceptions as found in the record, because it was prepared and settled as a whole instead of in parts. So far as can be judged from their argument and motion, counsel seem to think that a separate bill of exceptions must be settled for each exception saved during the trial. If this is the

correct rule, then it will be necessary to repeat the testimony each time that an objection is unsuccessfully made to the same line of testimony, and exception saved, and go on accumulating this testimony and repeating it indefinitely. Furthermore, where the sufficiency of the entire testimony is challenged unsuccessfully and exception saved, it would be necessary, according to counsel's theory, to repeat all of the testimony which had gone before and put it into a final bill showing the exception to the refusal of the Court to give the peremptory instruction prayed for. Counsel has not cited any cases, and we venture to say cannot cite any cases, requiring this to be done.

The bill of exceptions in this case is very different from that in the case of *Frank Waterhouse, Ltd., vs. Rock Island Alaska Mining Co.*, 97 Federal 466. The bill of exceptions found in the record in this case (Record 34-161) is not amenable to the objections urged by counsel. An examination of the bill of exceptions in this record would show that it contains the testimony as to purely formal matters in narrative form, the exhibits in full, and the principal testimony on behalf of the defendant in question and answer, the request for instructions on behalf of the plaintiff, the charge of the Court in full, and the exceptions saved thereto. It is not, as counsel says, intermingled with colloquies between counsel and the Court and between respective counsel. It is true that it is not split up into from twenty to fifty chapters dividing what occurred at the trial, but it does show, in an orderly and systematic manner, the entire proceedings of the trial.

The arrangement contended for by counsel for defendant in error might be applicable where the only errors urged related to the admission or rejection of evidence or an exception to one or two paragraphs of a charge based upon a small portion of the evidence. It certainly is not applicable to the review of an entire case.

This case went to the jury upon two, and only two, propositions of fact: First, was there a fraud in the procurement of the original note, the renewals of which are here in suit, and, second, was the assignor of plaintiff in error, the Citizen's State Bank, a purchaser for value without notice? We fail to see how the arrangement of the bill of exceptions could be improved upon.

Counsel make the further point that we have not, in our assignment based upon the instructions of the Court, set out in full the testimony claimed to make the instruction or refusal erroneous. The rules in this court (Rule 11) respecting assignments, contain no such requirement. The rule does require that an assignment based upon the rejection or admission of evidence must quote the testimony in full, and that an assignment based upon an instruction given or refused must quote the instruction. This makes a clear distinction. We certainly have complied with the rule.

Suppose counsel's theory is followed, what is the result? A large amount of testimony may be taken upon a particular proposition of fact, and one party presents two or three instructions embodying different questions of law applicable to this proposition. They are refused by the Court. Upon writ of error assigning the refusal of these instructions as error, this testimony must be printed in the bill of exceptions, and in embodying each exception must be printed two or three times again, or at best referred to in such a manner as to enable the Court to hunt it in the record. The burdensomeness of this practice can readily be seen.

Neither this Court nor any other Appellate Court has ever rendered any decision within the knowledge of counsel requiring such useless repetition. None of the cases cited by counsel sustain the contention of counsel in this

respect. It is the office of the brief to point out the testimony making the instruction erroneous or correct.

The cases referred to in 80 Federal 228-638 are evidently decided by the Court for failure to point out the evidence in the brief. The rules of the Fourth Circuit require the testimony to be set out with the assignment in the brief. If we are correct in our understanding of the cases we have no criticism to offer of the rule there laid down. If, however, it is based upon a rule such as we have in this Circuit respecting assignment, then it does seem to us that the rules should be amended so as to show exactly the requirements of the Court. It seems to us to require no argument to show the injustice of defining in the rules what is required and then punishing counsel for not putting into the record something not required by the rules.

There has never been a decision in this Circuit requiring counsel to incorporate in an assignment based upon the giving or refusal of instructions, the evidence claimed to show the error in the action of the trial Court.

If this rule is adopted by the Court it seems to us that it should be adopted as a rule and not visited upon the parties in a particular case who have brought themselves within the terms of an existing rule.

Counsel for defendant in error contend that our assignments of error 7, 8, 9, 10, 12, 13, 14 and 15 cannot be considered because no proper exception was taken. On page 15 of their brief, counsel correctly quote the manner of taking our exceptions. They omit, however, to refer to the local rule found at page 158 of the record. The contention of counsel upon this proposition seems to us a simple play upon words. In the face of the rule they would hardly have the hardihood to contend that we

could not identify the portions excepted to by number of paragraph.

It then comes down to this, and only this, that instead of proceeding as we did we should have repeated between each paragraph these words, "Plaintiff excepts to the refusal of the Court to give instruction No. 1," and then repeat these words again and use the figure 5, and so on indefinitely until the end of the instructions was reached. We are unable to see the virtue of this repetition or the necessity for it.

The theory of the giving or refusal of an instruction in the Federal Courts, and we may say in all Courts, is to enable the trial Court, if he wishes, to correct his rulings, and the object of the rule requiring the number to be specified is to enable the Court to see just what is objected to and if error has been committed, corrected before the jury retires.

The local rule found in the record 158 dispenses with the taking of exceptions before the jury retires, and distinctly prescribes how a portion or portions of the charge excepted to shall be identified.

Counsel for plaintiff in error have endeavored to abbreviate the record and have felt such endeavor to be meritorious. If the contention of counsel for the defendant in error is sustained, a premium will be placed upon prolixity and encumbering the record with useless matter.

Upon this point we cite: "A statutory requirement that instructions shall be numbered is held to be for the convenience of the Court and counsel in saving exceptions."

Railway Co. vs. Ward, 4 Colo. 36.
Poston vs. Smith's Executor, 71 Ky. 589.
Mann vs. Railway Co., 46 Iowa 637.

We venture to say that none of the cases cited by counsel for defendant in error was based upon such a local rule as we have in this district. When counsel have complied with the local rule we submit that they should not be punished therefor, by requiring them to conform to some other and different standard.

The greater part of the cases relied upon by counsel for defendant in error and the greater mass of the cases laying down the same rules, will be found upon a close examination to be based upon general exceptions to an entire charge, without any reference to any particular part or parts for identification. The reason of the rule is that counsel were required to be fair with the trial Court. How could anything be fairer than to refer him to the number of the paragraph in his charge as given or in the charge as refused. He could not be mistaken as to what counsel referred to and this Court has no difficulty in ascertaining what was excepted to.

We submit, therefore, that the motion to strike the bill of exceptions and to disregard the assignment of error should be denied.

ARGUMENT ON THE MERITS.

Counsel for defendant in error make the point that the bill of exceptions is insufficient to present the question of the right of the plaintiff in error to have a peremptory instruction in its favor. In considering this question the Court should look not only to the certificate appended to the bill of exceptions, but at the entire bill itself.

In *Gunnison County Commissioners vs. Rollins & Sons*, 173 U. S. 255, at page 62, the Supreme Court in discussing this question say that the Court should look beyond the certificate and examine the bill itself to ascertain whether

it contains all the evidence, so as to permit of an entire review of the case.

An examination of the bill in this case will show that the case was tried upon two defenses, viz: the Statute of Limitations and fraud, and that in the progress of the trial the defendant's own testimony eliminated the question of the Statute of Limitations and the Court charged it out of the case. Some attempt was also made to dispute the legality of the transfer of the paper from the Citizen's State Bank to the plaintiff in error. This also fell out in the progress of the trial and was abandoned. The case went to the jury upon the question of fraud in the obtaining of the original note of which these notes sued upon are renewals and the knowledge of the Citizen's State Bank of such fraud. Therefore in making up the bill of exceptions it became necessary under the repeated decisions of the Supreme Court, to embody only the evidence upon which the case actually went to the jury, and this we have done.

An examination of the bill will disclose that it contains, in narrative form in part and in part by question and answer, all of the evidence relating to the issues upon which the case was finally submitted, and just so much of the evidence as was so intermingled with it as to require its presence in the bill in order to make it intelligible. No one can read the exceptions and come to any other conclusion than that it contains all the evidence upon the issues submitted to the jury. The dropping out of these defenses explains the form of the certificates. We submit that the certificate is sufficient to review the entire case.

Tormley vs. Chicago, Milwaukee & St. Paul Ry. Co., 53 Wis. 626.

Waldron vs. Waldron, 156 U. S. 361.

II.

Counsel for defendant in error contend that we are responsible for the charge of the Court complained of in our eleventh assignment of error. Pages 42 and 43 of their brief are devoted to a discussion of this question. An examination of the instruction prayed by us, as found in the record at page 146, request 4 and of that ~~question~~ by the Court (record 151, 152), shows this argument of the defendant in error is fallacious.

For convenience of comparison we print the two instructions ~~complained of~~ in parallel columns, and ask the indulgence of the Court for this departure from the usual form of briefs.

"If the jury find from the evidence that when the Citizen's State Bank of Council Bluffs, Iowa, received the note made by the defendant for $5,000, in favor of George J. Crane, in March, 1893, the officers of the said bank knew of nothing to apprise them or put them upon inquiry that the said note was given without consideration or procured by fraud, the verdict of the jury will be for the plaintiff for full amount sued for."

"If the jury find from the evidence that when the Citizen's State Bank of Council Bluffs, Iowa, received the note made by the defendant for five thousand dollars, in favor of George J. Crane, in March, 1893, the officers of said bank knew of nothing to apprise them or put them upon inquiry *with respect to the claim now made by the defendant*, that the note was given without consideration or procured by fraud, the verdict of the jury will be for the plaintiff the full amount sued for."

Now, gentlemen of the jury, there is a question in the case as to which there is a conflict of testimony,

and it is referred to the jury to decide what the truth about it is, whether there was a knowledge on the part of the cashier, or whoever acted for the Citizen's State Bank of Council Bluffs, at the time of receiving that five thousand dollar note. It is shown by uncontradicted evidence that the transaction was through Mr. Hannan, who was an officer of that bank at that time, and whose deposition has been taken in this case. Mr. Hannan will be presumed as the result of the uncontradicted testimony in the case to have been authorized to act for the bank in that matter, and any knowledge or information which he had on the subject is to be imputed to his principal the bank for which he was acting, and the jury must determine this question of whether he knew of the fact Mr. Moore had been swindled (if in fact he was swindled) in the transaction by which the note was obtained by him.

In determining that question, you are to consider all the facts and circumstances attending the transaction, and showing what knowledge Mr. Hannan did have in regard to the maker and

the payees of the note, and in regard to their dealings together with respect to that note, *and the circumstances under which the note was obtained, and determine from a consideration of the testimony whether the evidence shows that Mr. Hannan did know of enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargeable not only with the knowledge which Mr. Hannan actually did have, but if there was some knowledge on his part, which should have been a warning to him, and would have caused a prudent business man to have made inquiry, then the bank is chargeable with all the knowledge which might have been obtained by an inquiry, and if there was a swindle practiced, and the bank, through Mr. Hannan, knew it or should have known it, then the note was equally void in the hands of that bank* as in the hands of Crane and Bellinger, and if void in the hands of the Citizen's National Bank, it is likewise void in the hands of the plaintiff bank."

The instruction as requested by us simply asks the Court to announce the Federal rule and we are certainly not responsible for any erroneous elaboration indulged in by the Court.

A specific exception taken by us and found in the record at page 159, shows plainly that there was no misunderstanding between the Court and counsel on that point, and that the counsel for plaintiff in error then occupied the same position on that question as they now occupy. On this point we cite:

O'Niell vs. Orr, 5 Ill. 1.
Blough vs. Parry, 43 Northeastern 46.

Counsel for plaintiff in error are certainly not responsible for the departure of the Court from the true Federal rule upon this question. By comparing the two instructions above printed, it will be seen that the Court changed and modified the instruction requested by us and then proceeded to enlarge upon the instruction given. What we asked for was the true Federal rule, viz: that unless the officers of the Citizen's State Bank knew of sufficient facts to discredit the paper or to put them upon inquiry respecting the origin of the paper, the plaintiff must recover.

The instruction requested is based wholly upon the knowledge of the officers, that is to to say their knowledge must go so far as to be either positive knowledge of the facts, or such knowledge of the facts as to compel them to make inquiry. We did not go to the extent to which the Court went and there is nothing in the instruction or in the record elsewhere to indicate that counsel adopted the theory laid down by the Court in the instruction complained of.

The exception shown on page 159 of the record shows exactly what our position was at that time.

The cases cited by counsel for defendant in error at page 43 of their brief are not in point. The case in 135 U. S. is a case of acquiescence of the plaintiff in error in an erroneous ruling made by the Court below. The case of *Bracken vs. Railway Co.* is one where the Court gave an instruction as prayed in the language of the plaintiff in error. In *Harper vs. Moss*, it appears that the plaintiff in error had given evidence in support of the theory of the case, and the Court charged favorably to the theory. In the case of 51 Kan. the Court gave the instruction in the exact language asked by counsel. None of these cases are in point. The instruction complained of is certainly erroneous. The Court in effect told the jury at record 152, that if Mr. Hannan had, not merely knowledge but suspicion, that something was wrong with the paper, the bank would be bound, not only by what he did know but by anything which he might have found out by inquiry. This was certainly allowing the defendant in error to go to the jury upon a mere possible suspicion.

We reiterate that an examination of Hannan's testimony will show that he has not testified to any knowledge, or even suspicion, on his part that the note was unlawfully and improperly acquired, and that there was anything illegal or crooked in the transaction out of which the note grew.

Finally upon this point we desire to suggest that this instruction was improper because the evidence of the defendant and the evidence of Crane as pointed out in our opening brief shows that if the bank had made inquiry they would not have learned of anything to impeach the paper, but would have been encouraged to buy it.

Moore says in his testimony (record 94) and in his letter of February 28 (record 108) that he did not know that there was anything wrong with the transaction until long after the renewal of the paper. We urge as in our opening brief that Hannan's testimony does not show that he had the least inkling of any illegality in the transaction in which the paper was given. There was nothing illegal or contrary to public policy in the selling of such a cure, and Hannan does not say, or even hint, that he knew that it was done in an illegal manner, something which we do not at all concede.

II.

Counsel for defendant in error are mistaken in their claim that the facts in this case do not make out a novation. We feel satisfied that the authorities cited by us in our opening brief, demonstrate that it is not necessary in order to constitute a novation that all three of the parties should meet at the same time. It is enough if two of them make a contract for the benefit of the third, and he accepts it promptly when it comes to his knowledge. Moore, in making the contract of renewal with the bank, acted upon the knowledge and information which he then had and it will not do to now allow him to change his ground. Any contract and any settlement or adjustment of any matter could not be considered complete or final if the parties to it are to be permitted, after the lapse of years, to repudiate obligations entered into because of after-acquired information.

Counsel for defendant in error cites the case of *Rash vs. Farley*, which is not at all in point. That case turned upon a subsequent agreement between the parties by which both agreed to abide the event of a certain suit. There was at least the implied agreement on both sides to honestly

inform each other as to the result of such action. There is nothing of the sort in this case. The Citizen's State Bank and J. A. Moore were dealing at arms-length with respect to the renewal of this note and the bank was merely asserting an alleged right. It was the business of Moore before he acted upon that to know, and he was bound to know, at his peril, the nature and extent of the soundness of the bank's claim. Furthermore according to Moore's own testimony that question was not seriously raised. Moore says that he was not at that time conscious that the consideration for his paper had in any wise failed and that he was very glad to renew the paper. This is shown by exhibit R, record 108, and Moore's testimony (record 118).

We submit, therefore, that the judgment of the trial Court should be reversed and the record sent down with instructions to enter a judgment in favor of the plaintiff in error for the full amount of plaintiff's claim, and if we are mistaken in that view, that it should be reversed because of the error in the instructions, and the record remitted with instructions to grant a new trial.

Respectfully submitted,

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